No. 2238

United States

Circuit Court of Appeals

For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY (a Corporation),

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

Index.

[Names and Addresses of Attorneys.]

W. W. COTTON, Esq., A. C. SPENCER, Esq., FRED E. BUTLER, Esq., W. A. ROBBINS, Esq., Portland, Oregon,

Messrs. HAMBLEN & GILBERT, Spokane, Washington,

Attorneys for Plaintiff in Error.

C. H. LINGENFELTER, Esq., Boise, Idaho,

Attorney for Defendant in Error.

In the District Court of the United States Within and for the District of Idaho, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Complaint.

Comes now the plaintiff, the United States of America, by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in this behalf by the direction of the Attorney General of the United States, and complains of the defendant, The Oregon-Washington Railroad & Navigation Company, and alleges:

I.

That at all times hereinafter mentioned the Oregon-Washington Railroad & Navigation Com-

pany was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon engaged in business as a common carrier in interstate commerce, and operating a line of railroad extending from the State of Oregon into the States of Washington and Idaho.

II.

That said railroad forms a part of a line of road over which passengers and freight, including mules, horses, cattle, sheep, swine and other animals, are conveyed between, into and through the states hereinbefore mentioned. [1*]

III.

That heretofore, to wit, on or about the 6th day of February, 1912, the defendant, the Oregon-Washington Railroad & Navigation Company, received at Wallace, Idaho, for shipment to Osborne, Idaho, certain swine, to wit, one carload consigned by Albert May to F. A. Stevens; that said stock was received at Wallace, Idaho, from the Northern Pacific Railroad Company, a corporation, and that said stock was loaded at Stevensville, Mont., on February 5, 1912, at 12:15 P. M. mountain time on said *said* Northern Pacific Railroad Company on the following car, to wit, N. P. 90,515; that said defendant received said shipment of stock at Wallace, Idaho, with knowledge that the same was loaded at 12:15 P. M. mountain time on February 5, 1912, at Stevensville, Mont., as aforesaid, and thereupon the said defendant conveyed said stock on its line aforesaid as a common carrier in the same car aforesaid to its station at

*Page-number appearing at foot of page of original certified Record.

Osborne, Idaho, at which place the said stock was unloaded at 7 o'clock A. M. Pacific Time on the 7th day of February, 1912, the said stock having been continuously confined in said car from the time of their receipt by the said Northern Pacific Railroad Company, and while in transit over the lines of said defendant to the time of the unloading as aforesaid at Osborne, Idaho, without food, water, rest or unloading, a period of 43 consecutive hours and 45 minutes.

IV.

That from the time said animals were first loaded at Stevensville, Mont., as aforesaid, and from the time they were received at Wallace, Idaho, by this defendant as aforesaid, said animals had been continuously confined in the said car without unloading, feeding, watering or resting, knowingly and wilfully by the said defendant for a longer period than 28 consecutive hours, to wit, for a period of 43 consecutive hours and 45 minutes. [2]

V.

That by reason of the foregoing, the said defendant became and was and now is liable to the plaintiff, the United States of America, as penalty in the sum of Five Hundred Dollars.

WHEREFORE, the plaintiff demands judgment against the said defendant for the sum of Five Hundred Dollars, together with costs and disbursements of suit.

C. H. LINGENFELTER,

United States Attorney for the District of Idaho, and Attorney for Plaintiff Residing at Boise, Idaho. [3]

State of Idaho,
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says that he is the United States Attorney of the District of Idaho, and as such makes this affidavit for and on behalf of the plaintiff; that he has read the above and foregoing complaint and knows the contents thereof, and that he believes the facts stated in said complaint to be true.

C. H. LINGENFELTER.

Subscribed and sworn to before me this 10th day of April, 1912.

A. L. RICHARDSON,
Clerk of the United States District Court.

[Endorsed]: Filed April 10, 1912. A. L. Richardson, Clerk. [4]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 438.

THE UNITED STATES OF AMERICA

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation.

Summons.

The President of the United States to The Oregon-Washington Railroad & Navigation Company, a Corporation, the Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the

above-entitled court, holden at Coeur d'Alene in said District, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this Summons upon you, if served within the Northern Division of said District, or if served within any other Division of said District, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to wit:

For judgment in the sum of Five Hundred Dollars, together with costs and disbursements of suit.

The facts more fully appearing in plaintiff's complaint, a certified copy of which is served herewith, hereby referred to, and made a part hereof.

And this is to COMMAND you, the MARSHAL of said district, or your DEPUTY, to make due service and return of this Summons. Hereof fail not.

Witness the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Boise in said District this 11th day April, 1912.

[Seal] A. L. RICHARDSON,
Clerk.

U. S. Attorney, Boise, Idaho, Attorney for Plaintiff.

[Endorsed]: No. 438. In the District Court of the United States, for the District of Idaho, Northern Division. The United States of America vs. The Oregon-Washington Railroad & Navigation Company. Summons. Returned and filed April 29th, 1912. A. L. Richardson, Clerk. [5]

Marshal's Return on Summons.

This is to certify that I received the within Summons, together with a certified copy of the complaint at Lewiston, Idaho, on the 15th day of April, 1912, and served the same on The Oregon-Washington Railroad & Navigation Company, a corporation, on the 16th day of April, 1912, at Lewiston, Nez Perce County, Idaho, by handing to and leaving with C. W. Mount, agent of The Oregon-Washington Railroad & Navigation Company, a corporation, a duplicate of the within summons, together with a certified copy of the complaint.

Dated April 16th, 1912.

S. L. HODGIN,
U. S. Marshal.
By Wm. Schuldt,
Deputy. [6]

In the District Court of the United States Within and for the District of Idaho, Northern Division.

No. 438.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Answer.

Comes now the defendant, the Oregon-Washington Railroad & Navigation Company, and for answer to

plaintiff's complaint admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph one of the complaint.

II.

Admits the allegations contained in paragraph two of the complaint.

III.

For answer to paragraph three of the complaint, defendant alleges that it has no knowledge or information sufficient to form a belief as to whether any or either of the allegations contained therein are true and therefore denies the same and the whole thereof, except that defendant admits that it received from the Northern Pacific Railway Company at Wallace, Idaho, a shipment of hogs, consigned by Albert May of Stevensville, Montana, to F. A. Stevens at Wallace, Idaho; [7] that the said destination was later changed to Osborne, Idaho, admits that said shipment was loaded into N. P. car No. 90,515; admits that this defendant transported this shipment from Wallace to Osborne, Idaho.

IV.

For answer to paragraph four of the complaint, defendant alleges that it has no knowledge or information sufficient to form a belief as to whether any or either of the allegations contained therein are true and therefore denies the same and the whole thereof.

V.

Denies each and every allegation contained in paragraph five of the complaint.

WHEREFORE having fully answered plaintiff's complaint, defendant demands that this action be dismissed and it have and recover its costs and disbursements herein.

A. C. SPENCER,
FRED E. BUTLER,
W. A. ROBBINS,
Attorneys for Defendant. [8]

State of Oregon,
County of Multnomah,—ss.

James G. Wilson, being first duly sworn, deposes and says that he is Assistant Secretary for the defendant, the Oregon-Washington Railroad & Navigation Company, that he has read the foregoing answer, knows the contents thereof and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information or belief, and as to those matters that he believes it to be true.

JAMES G. WILSON.

Subscribed and sworn to before me, this 6th of May, 1912.

[Seal] P. C. WOOD,
Notary Public for Oregon.

[Endorsed]: Filed, May 8, 1912. A. L. Richardson, Clerk. By M. W. Griffith, Deputy Clerk. [9]

United States District Court, Northern Division, District of Idaho.

No. 438.

THE UNITED STATES,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff.

M. J. McHUGH,
Foreman.

[Endorsed]: Filed May 29, 1912. A. L. Richardson, Clerk. **[10]**

In the District Court of the United States Within and for the District of Idaho, Northern Division.

No. 438.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Defendant.

Judgment.

In this cause it appearing to the Court that on the

29th day of May, 1912, a jury duly empaneled, found for the plaintiff, in the above-entitled court, in said cause:

Now, therefore, it is ordered, adjudged and decreed that the plaintiff, the United States of America, do have and recover of and from the defendant, the Oregon–Washington Railroad & Navigation Company, a corporation, the sum of One Hundred Dollars, being the amount assessed by the court as a penalty, as provided by law; and further, the sum of $76.40, as costs.

Dated June 6th, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed June 6, 1912. A. L. Richardson, Clerk. [11]

In the District Court of the United States in and for the District of Idaho, Northern Division.

No. 438.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation Extending Time for Serving Proposed Bill of Exceptions.

IT IS HEREBY STIPULATED, and agreed. by and between the above-named plaintiff and the above-named defendant, through their respective

attorneys, that the time within which the above-named defendant may prepare, serve and file its proposed Bill of Exceptions in the above-entitled cause, be extended to July 15th, 1912.

C. H. LINGENFELTER,
United States Attorney,
Attorney for Plaintiff.
By H. C. MILLS, Asst.
W. W. COTTON,
HAMBLEN & GILBERT,
Attorneys for Defendant.

[Endorsed]: Filed July 12, 1912. A. L. Richardson, Clerk. [12]

In the District Court of the United States for the District of Idaho, Northern Division.

No. 438.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Stipulation [Concerning Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiff and defendant in the above-entitled cause, by their respective attorneys, that the Bill of Exceptions hereto attached embodies all of the exceptions proposed by either party hereto in said cause, and that there are no amend-

ments or proposed amendments thereto; that the said Bill of Exceptions may be settled by the Judge of said Court in the manner provided by the rules of said Court, without further objection by either party hereto.

Dated this 28th day of October, A. D. 1912.

C. H. LINGENFELTER,
U. S. District Attorney,
Attorney for Plaintiff.

W. W. COTTON,
HAMBLEN & GILBERT,
Attorneys for Defendant, Oregon-Washington Railroad & Nav. Co. [13]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 438.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED, that on the 29th day of May, 1912, at Coeur d'Alene, Idaho, the above-entitled action came regularly on for trial before the Honorable Frank S. Dietrich, plaintiff appearing by C. H. Lingenfelter, United States Attorney, the defendant appearing by W. A. Robbins and W. S. Gilbert; a jury was duly empaneled and sworn to try

the cause; whereupon, counsel for the respective parties stipulated that this case and case No. 437 should be consolidated for the purpose of trial, separate verdicts to be rendered in each case; whereupon the following proceedings were had:

Plaintiff produced witnesses whose testimony showed that on February 5th, 1912, one Albert May shipped a car of hogs from Stevensville, Montana, to Wallace, Idaho, over the Northern Pacific consigned to Fred Stevens; that the car was loaded at Stevensville at about 12:30 on February 5th; that the car was not provided with feed or water, nor any provision made therefor; that the billing of the car of stock was changed by the Northern Pacific agent at Wallace, from Wallace to Osborne, Idaho.

[Testimony of Albert May, for Plaintiff.]

ALBERT MAY, a witness for plaintiff, testified as follows: [14]

"I am not certain, I wouldn't be positive, whether the hogs were consigned to Wallace or Osborne, Idaho. It seemed to me it was ordered to Osborne."

[Testimony of David Franklin Norris, for Plaintiff.]

DAVID FRANKLIN NORRIS, a witness for plaintiff, testified as follows:

"The car arrived from Stevensville, Montana, to Wallace, Idaho, before 3:30 P. M. on February 6, 1912. It was not unloaded at Wallace, but was unloaded at Osborne, Idaho, on the 7th of February. I don't know positively what hour it was unloaded at Osborne. I didn't see it unloaded. The first that I had called my attention to this car. This car which

(Testimony of David Franklin Norris.)

came from Stevensville, Montana, which arrived at Wallace on the night of the 6th, was not unloaded for feed, rest and water at any time at Wallace. I know this car wasn't unloaded as the stockyards have a chute that is raised up in order for hogs or any stock to walk on a level out of the car onto a platform and then down an incline to the ground, and in the early part of last winter we had an awful big snow and this snow drifted very deep in the chute, and practically stayed there, a part of this snow, all winter, and that snow wasn't broke all winter from hogs being unloaded, neither in the Northern Pacific nor the O. W. R. & N. stockyards in Wallace. I seen N. P. Car No. 90,515 on the transfer track at 5:15 P. M. on the 6th. I saw the O. W. R. & N. train on the O. W. R. & N. sidetrack; at 11:45 the same evening the car was at the place it was at 7 P. M. Between six and seven o'clock the morning of the 7th of February I seen the car in the train with the train under motion towards Osborne, Idaho, leaving Wallace towards Osborne."

The following testimony of J. C. Allen, commencing on page 39 of the transcript, should be incorporated. [15]

[Testimony of J. C. Allen, for Plaintiff.]

J. C. ALLEN, a witness for plaintiff, testified as follows:

"I was at Osborne, Idaho, on February 5, 1912, employed by F. A. Stevens. I had charge of the office work at that point and receiving the shipments of stock. I remember of the carload of hogs arriv-

(Testimony of J. C. Allen.)

ing at Osborne, Idaho, on February 7, 1912, shipped by May at Stevensville, Mont., and consigned to F. A. Stevens. The car was unloaded about seven A. M. on the morning of the 7th. The number of the car is N. P. 90,515, and it arrived over the O. W. R. & N. side track, and again at 11:45 the same evening the car was in the same place."

Witnesses further stated that the car was transported by the defendant the morning of the 7th from Wallace to Osborne, and was unloaded about seven o'clock on that date.

[Testimony of H. A. Bard, for Defendant.]

One H. A. BARD, agent of the defendant at Wallace, testified:

"I was agent for the defendant at Wallace on February 7th of this year. I have records or knowledge to the effect that the car in controversy here, arrived in Wallace on February 6th. I have the way-bill here. As to whether or not this way-bill shows when the car arrived, will say that this way-bill does not show it. It shows the delivery to our line is all. The Northern Pacific train register would show their time into Wallace, and of course the delivery here is simply between the connections.

I do not know about this car of hogs having any feed, rest or water. As to whether or not it is my duty as agent to know whether or not a car of stock has been unloaded for rest, feed and water [16] before accepting a car from a connecting carrier, I can't say that it is. I made inquiry as to this stock

(Testimony of H. A. Bard.)
when the car was first turned over to us on the transfer. At that time, my recollection is, that this car had not been unloaded for feed, rest and water; a few minutes before one o'clock in the afternoon. At one o'clock P. M. I knew the car had not been unloaded. I did not observe any one unloading the car of hogs after one o'clock P. M. on February 6th. I turned the car back on the Northern Pacific, refused to accept the car. The car was later sent to Osborne over the O. W. R. & N. Co.'s line."

On cross-examination he further testified: "I refused to accept this shipment from the Northern Pacific. I had a conversation with Mr. C. M. Grubb, the General Agent at that point. At the time the car was delivered to us in transfer and the way-bill delivered, I noticed that the stock had been confined a period of something to exceed twenty-four hours and some minutes. I knew it was impossible for us to get that car to Osborne before the following morning, which would exceed the 36-hour period, and I told Mr. Grubb he would have to take the car back in his yards and unload it for feed, rest and water. Mr. Grubb said, 'All right.' It was very close to one o'clock, immediately after it came to my attention, on February 6th. Our company later accepted delivery of the car, between 6:25 and 6:30 that evening. The car was then lined up in train No. 93, going west. At that time I did not personally know what had become of the car or what had been done with the hogs.

Q. Is there any notation on that way-bill showing

(Testimony of H. A. Bard.)

whether or not this particular car in question was unloaded for feed, rest and water?

A. There is a notation here, but it is wrong. There is a notation here that reads that it was unloaded at Wallace, [17] N. P. at 10 A. M., and we unloaded at 6 P. M.

Q. What is your best recollection—had this car been unloaded for feed, rest and water?

A. It hadn't when I first heard of it, no.

Q. On the morning of the 6th?

A. No, not in the morning—it was a few minutes of one in the afternoon.

Q. On the evening of February 6th, at six—what time do you say the train goes out?

A. The following morning.

Q. The following morning, on the 7th, it went out?

A. Yes, sir.

Q. At that time this car hadn't been unloaded for feed, rest and water?

A. Not to my knowledge; no, sir."

Also the following on page 48 of the transcript should be incorporated:

"Q. In regard to that pencil notation that counsel for the Government inquired about, do you know who put that on?

A. I think it was my operator, I am not sure.

Q. Do you know how it came to be put there?

A. I am sure I don't—it is clearly an error.

Q. How do you judge it is an error?

A. Well, I don't know, I can't say why I do, but I don't think it is correct; in fact, I know it isn't

(Testimony of H. A. Bard.)

correct, because I know the Northern Pacific train wouldn't arrive that early in the morning, in the first place, the train that brought the car of stock to Wallace—

Q. What I am getting at is, you had nothing to do with making that notation yourself? [18]

A. No, sir."

Thereupon counsel for the plaintiff, with the consent of the Court, read from the way-bill accompanying the shipment of hogs in question:

[Description of Way-Bill.]

"Way-bill from Stevensville, Montana, dated February 5th, 1912, to Osborne, Idaho. Consignors May & Truner, Consignee, F. A. Stevens. No one in charge. Loaded 12 P. M. 2–5–12. Released to 36 hours."

Thereupon counsel for defendant read another portion of said way-bill into the record, as follows: "We want the record to show that this way-bill shows that the stock was originally billed from Stevensville, Montana, to Wallace, Idaho, and that a pen line has been drawn through the words 'Wallace, Idaho,' and under it 'Osborne, Idaho,' has been written and across the face of the way-bill is written the following: 'Heading changed by N. P. Agent, Wallace, signed underneath *that Mr.* Grubb's name, C. H. Grubb.' "

Thereupon the plaintiff rested its case and the defendant made the following motion:

[Motion for a Nonsuit, etc.]

At this time, your Honor, we desire to introduce a motion for nonsuit on the ground and for the reason that the Government has failed to make a sufficient case for the jury, as follows:

1. There is no proof that the defendant knew or had any reason to believe that the Northern Pacific did not unload the stock at Wallace, after defendant had refused to accept delivery from the Northern Pacific. The defendant had a right to presume that the Northern Pacific had complied with the law in this respect, and for this reason plaintiff has failed to prove that defendant knowingly or wilfully confined the stock in violation of the statutes.

2. The failure of the Northern Pacific to comply with [19] the law in not unloading the stock at Wallace was an unavoidable cause which could not be anticipated or avoided by the defendant with the exercise of due diligence and foresight, and which prevented the defendant from unloading the stock into properly equipped pens within the statutory time.

3. The evidence shows that after the defendant refused to accept the delivery of the car from the Northern Pacific at Wallace, the Northern Pacific allowed the car to stand on its tracks without unloading for more than the statutory limit. The defendant did not contribute in any to this confinement until after the statutory offense had been committed by the Northern Pacific, and there was no second violation of the law by defendant, since defendant could not commit a second offense until it had con-

fined the stock twenty-eight or thirty-six hours after it had accepted delivery of the car from the Northern Pacific.

Thereupon the Court denied the motion, to which ruling the defendant excepted and exception was allowed.

Thereupon defendant announced that it would stand upon its motion for nonsuit, and would offer no further evidence.

Recital as to Instructions of the Court, Requested Instructions and Exceptions.

Thereupon the Court instructed the jury, among other things, as follows:

[Instructions.]

Now, there is still left for your consideration, No. 438, that I am not able to instruct you to find a verdict in for either one party or the other. It seems that the shipment in question here was made from Stevensville, Montana, to Wallace, Idaho, or by change in the way-bill, to Osborne, Idaho. The initial carrier was the Northern Pacific Railroad Company. In other words, the [20] shipment of the car by that company was made with Northern Pacific Railway Company and delivery of the car was made by that company to the defendant at Wallace. Now, you have heard the testimony as to what occurred at Wallace. There seems to be no conflict in the testimony to the effect that the stock in this car were confined in excess of the statutory period. In other words, as I understand, there is no evidence contradicting the witnesses for the Government that the stock was actually confined for a period in excess

of twenty-eight hours, and indeed, in excess of thirty-six hours, and, of course, if you credit that testimony it would be your duty to find that they had been so confined and that one or the other of these two carriers, the Northern Pacific Railroad Company or this Company violated this law—I say one or the other or both of them. The Northern Pacific Railroad Company is not made a defendant here, so that you must determine whether or not this defendant company, the Oregon-Washington Railroad & Navigation Co., violated the law. You heard the testimony of the agent of the defendant company at Wallace, that this car was offered to his company at Wallace on the afternoon of February 6th, and that upon inquiry, or upon examining the shipping bill, he learned that the stock had been in transit for a certain number of hours, and he concluded that his company could not receive the car and deliver it at Osborne within the statutory period, and therefore he declined to accept it, and advised the Agent of the Northern Pacific Company to that effect. And his testimony further is, as I now remember it, that the Agent of the Northern Pacific Railroad Company replied, "All right," or words to that effect, and later on in the afternoon, according to the testimony of this witness, his company, the defendant here, received the car and put it in the train which was being made up for Osborne, the train which was to leave the [21] next morning, and the car was taken to Osborne and delivered to the consignee the next morning. Now, practically the only serious question, the question about which the testimony is not clear, if you credit

it, is as to whether or not the defendant here, the Oregon-Washington Railroad & Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the agent of the defendant told the agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the defendant company, through its agent, to make reasonable inquiry and to use reasonable care to find out whether or not the stock had been unloaded and otherwise cared for as provided by the statutes, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled, then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant.

[Instructions Requested by Defendant.]

The defendant requested the Court to give the following instructions:

I.

You are requested to return a verdict in favor of the defendant, Oregon-Washington Railroad & Navigation Company.

If the foregoing instruction Number One be re-

fused, then the defendant, without waiving its right thereto, requests [22] the Court to give the jury the following instructions:

II.

You are instructed that if the Northern Pacific Railway Company tendered this shipment to the defendant at Wallace, Idaho, on February 6th, 1912, at about the hour of 1:00 P. M. thereof, that at said time and place the defendant refused to accept delivery of said car from the Northern Pacific Railway Company, for the reason that its train connections were such that it could not deliver the car at Osborne within the statutory limit and that after the defendant refused to accept delivery of said car, the Northern Pacific Railway Company permitted the stock to remain in the car over the statutory limit without unloading for feed, water and rest, then I instruct you that the defendant has not violated the law and in that event your verdict must be for the defendant.

III.

If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had *first refused* by the defendant on February 6th, then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these cir-

cumstances your verdict must be for the defendant.

IV.

You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was [23] refused by the defendant on February 6th, if you so find, was an unavoidable cause which could not be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant.

V.

If you find from the evidence that the defendant refused to accept delivery of the car from the Northern Pacific Railway Company on February 6th, 1912, and after said refusal the Northern Pacific Railway Company allowed the car to stand on its tracks without unloading, as required by the statutes, then I instruct you that the first violation of the law on the part of the Northern Pacific Railway Company was completed and there could be no second violation of the law by the defendant, it had, in fact, confined the stock a second 28 to 36 hours from and after the time it accepted delivery of the car from the Northern Pacific Railway Company. In other words, if you find that the Northern Pacific Railway Company confined this stock over the statutory period on their line and then delivered the car to the defendant, that the defendant would not be guilty of a violation of the law until it had confined the stock another 28 or 36 hours in addition to the time the stock was confined by the Northern Pacific Railway Company.

The Court refused to allow said requested instructions.

[Exceptions to Instructions Given and Refused.]

Thereupon, the defendant excepted to the refusal of the court to give defendant's requested instructions Nos. 1, 2, 3, 4 and 5.

The defendant also took the following exception to the instructions of the Court: **[24]**

The defendant also excepts to the instructions of the Court to the jury on its own motion, to the effect that it was the duty of the defendant to use reasonable care after having first refused to accept the shipment of stock, to ascertain if the stock had been unloaded for rest, water and feed; and also that part of the instructions given by the Court on its own motion that it was necessary for the defendant to be deceived by the action of the connecting carrier before it would be entitled to rely upon the failure of the Northern Pacific to unload.

The Court said: "Well, as to that last, I intended to instruct the jury only to this effect, that if the defendant used reasonable care, and after using such reasonable care was deceived or misled, then it would be relieved. I didn't mean to say to them that it would be necessary for them to be deceived, that is, apart from the reasonable care.

Mr. GILBERT.—Well, I think perhaps that was correct.

The COURT.—If that is not understood, I will recall the jury and make it plain. I think they were coupled.

Mr. GILBERT.—Yes, I think they were coupled."

[Order Settling and Allowing Bill of Exceptions.]

Settled and allowed as defendant's Bill of Exceptions, pursuant to Stipulation attached.

Done this October 28th, 1912.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Oct. 29, 1912. A. L. Richardson, Clerk. [25]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error,

Petition for Writ of Error.

And comes now the plaintiff in error, Oregon-Washington Railroad & Navigation Company, a corporation (defendant in the action), and says that on or about the 1st day of June, A. D. 1912, the above-entitled District Court entered a judgment herein in favor of the plaintiff, United States of America, and against the defendant, Oregon-Washington Railroad & Navigation Company, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in

detail appear from the Assignment of Error which is attached to and filed with this petition.

WHEREFORE, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Nav. Co. [26]

[Order Allowing Writ of Error.]

On consideration of the foregoing petition and assignments of errors attached thereto, the Court does allow the Writ of Error to defendant, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

Dated this 27th day of November, 1912.

FRANK S. DIETRICH,
United States District Judge for the District of Idaho, who tried said cause and entered said judgment.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [27]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error,

Assignment of Errors.

Plaintiff in error, the Oregon-Washington Railroad & Navigation Company, hereby assigns the following errors committed at the trial court:

1. The District Court erred in overruling defendant's motion for nonsuit made at the close of plaintiff's case.

2. The District Court erred in giving the following instruction: "Now, practically the only serious question, the question about which the testimony is not clear, if you credit it, is as to whether or not the defendant here, the Oregon-Washington Railroad & Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the agent of the defendant told the agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the defendant company, through its agent, to make reasonable inquiry and to use reasonable care to find out whether or not

the stock had been unloaded and otherwise cared for as provided by the statute, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did [28] use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled, then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant."

The foregoing instruction was excepted to and is erroneous, because it incorrectly stated the law as to the duty of the defendant as to making inquiry, etc.

3. The District Court erred in refusing to give instruction No. 2, requested by the defendant, as follows:

"You are instructed that if the Northern Pacific Railway Company tendered this shipment to the defendant at Wallace, Idaho, on February 6th, 1912, at about the hour of 1:00 P. M., thereof, that at said time and place the defendant refused to accept delivery of said car from the Northern Pacific Railway Company for the reason that its train connections were such that it could not deliver the car at Osborne within the statutory limit, and that after the defendant refused to accept delivery of said car, the Northern Pacific Railway Company permitted the stock to remain in the car over the statutory limit without

unloading for feed, water and rest, then I instruct you that the defendant has not violated the law and in that event your verdict must be for the defendant."

4. The District Court erred in refusing to give instruction No. 3 requested by defendant, as follows:

"If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had first refused by the defendant on February 6th, [29] then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these circumstances your verdict must be for the defendant."

5. The District Court erred in refusing to give instruction No. 4 requested by the defendant, as follows:

"You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was refused by the defendant on February 6th, if you so find, was an unavoidable cause which could not be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant."

6. The District Court erred in refusing to give

instruction No. 5, requested by the defendant, as follows:

"If you find from the evidence that the defendant refused to accept delivery of the car from the Northern Pacific Railway Company on February 6th, 1912, and after said refusal the Northern Pacific Railway Company allowed the car to stand on its tracks without unloading, as required by the statutes, then I instruct you that the first violation of the law on the part of the Northern Pacific Railway Company was completed and there could be no second violation of the law by the defendant, it had, in fact, confined the stock a second 28 to 36 hours from and after the time it accepted delivery of the car from the Northern Pacific Railway Company. In other words, if you find that the Northern Pacific Railway Company confined this stock over the statutory period on their line and then delivered the car to the defendant, that the defendant would not be guilty of a violation of the law until it had confined the stock another 28 or 36 hours in addition to the time the stock was confined by the Northern [30] Pacific Railway Company."

WHEREFORE, plaintiff in error prays that said judgment of the District Court be reversed and the said District Court ordered to enter judgment dismissing the action.

A. C. SPENCER,
HAMBLEN & GILBERT,
Attorneys for Plaintiff in Error, Oregon-Washington Railroad & Navigation Company.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [31]

In the United States District Court for the District of Idaho, Northern Division.

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Supersedeas and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, Oregon-Washington Railroad & Navigation Company (a corporation), as principal, and National Surety Company (a corporation organized under the laws of the State of New York for the purpose of doing business as a surety and which has complied with the statutes of the United States authorizing it to become a surety of bonds in the Courts of the United States), as surety, are held and firmly bound unto the United States of America in the just and full sum of Five Hundred Dollars ($500.00), to be paid unto the said above-named United States of America, its attorneys, officers or assigns, to which payment, well and truly to be made we bind ourselves, our successors and our assigns jointly and severally firmly by these presents.

Sealed with our seals and dated this 2d day of November, A. D. 1912.

Upon the conditions that:

WHEREAS, lately at a session of the United States District Court for the District of Idaho, Northern Division, in a suit pending in said court between the United States of America and the Oregon-Washington [32] Railroad & Navigation Company, a corporation, a judgment was rendered against said defendant upon the verdict of the jury in the sum of One Hundred Dollars ($100.00) and costs amounting to Seventy-six Dollars and Forty Cents ($76.40); and,

WHEREAS, said defendant conceiving itself aggrieved thereby, has obtained from said Court a Writ of Error to reverse and correct said judgment in that behalf and a citation directed to the above-named defendant in error admonishing said defendant in error to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California within the time therein fixed; and,

WHEREAS, an order has been entered requiring said defendant to file Supersedeas Bond and Cost Bond in the aggregate sum of Five Hundred Dollars ($500.00);

NOW, the condition of the above obligation is such that if the said Oregon-Washington Railroad & Navigation Company, a corporation, shall prosecute its said Writ of Error to effect, and answer all damages and costs if it fails to make its plea good in said court, then the above obligation to be void; otherwise

to remain in full force and virtue.

This bond is intended as a bond for costs on appeal and as a Supersedeas Bond.

OREGON–WASHINGTON RAILROAD & NAVIGATION COMPANY.
By A. C. SPENCER and
HAMBLEN & GILBERT,
Its Agents and Attorneys.
NATIONAL SURETY COMPANY,
By JAMES A. BROWN,
Resident Vice–President.
[Seal] Attest: S. A. MITCHELL,
Resident Asst. Secretary. [33]

The foregoing Bond is hereby approved this 27th day of November, 1912, and the same when filed shall operate as a bond for costs on appeal and as a Supersedeas Bond.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Nov. 27, 1912. A. L. Richardson, Clerk. [34]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the United States, for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, between the United States of America, plaintiff, and the Oregon-Washington Railroad & Navigation Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said defendant, the Oregon-Washington Railroad & Navigation Company, a corporation, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco on the 27th day of December, 1912, in the said Circuit Court of Appeals for the Ninth Circuit, to be then and there held, that the record and proceedings being inspected, [35] the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

WITNESS, The Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 27th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] A. L. RICHARDSON,
Clerk U. S. District Court, for the District of Idaho.

Allowed by:

FRANK S. DIETRICH,
Judge. [36]

[Endorsed]: No. 438. U. S. District Court, Northern Division, District of Idaho. Oregon-Washington Railroad & Navigation Co., Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Nov. 27th, 1912. A. L. Richardson, Clerk. [37]

In the District Court of the United States for the District of Idaho, Northern Division.

AT LAW—No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Citation on Writ of Error.

United States of America,
District of Idaho,—ss.

To the United States of America, and to Its Attorney, C. H. LINGENFELTER, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States, District of Idaho, wherein the Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Coeur d'Alene, in said District, this 27th day of November, 1912.

FRANK S. DIETRICH,
Judge.

[Seal] Attest:
A. L. RICHARDSON,
Clerk. [38]

Service of the within and foregoing Citation hereby acknowledged by copy this 27th day of November, 1912.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho.

[Endorsed]: No. 438. United States District Court, District of Idaho, Northern Division. Ore-

gon-Washington Railroad & Navigation Company, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation. Filed November 27, 1912. A. L. Richardson, Clerk. [39]

Return to Writ of Error.

And therefore it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. [40]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States for the District of Idaho, Northern Division.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 41, inclusive, to be full, true and correct copies of the pleadings and proceedings in

the above-entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of $26.60, and that the same has been paid by the plaintiff in error.

Witness my hand, and the seal of said Court, this 9th day of December, 1912.

[Seal] A. L. RICHARDSON,
Clerk. [41]

[Endorsed]: No. 2238. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division.

Filed January 3, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

[Order Enlarging Time Ten Days to File Record in Circuit Court of Appeals.]

In the United States District Court, for the District of Idaho, Northern Division.

No. 438.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

This matter coming on for hearing upon the application of the plaintiff in error for an extension of time within which to file its transcript in the United States Circuit Court of Appeals for the Ninth Circuit, and to docket said case, and the Court being satisfied that good cause exists for granting such extension:

IT IS ORDERED, that said time for filing said transcript and docketing said case be, and the same is hereby, extended for a period of ten days.

Done this 27th day of December, 1912.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: No. 2238. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time Ten Days to File Record Thereof and to Docket Case. Filed Jan. 6, 1913. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation
Plaintiff in Error

vs.

UNITED STATES OF AMERICA,
Defendant in Error

No. 2238

Upon Writ of Error to the United States District Court of the District of Idaho, Northern Division

OPENING BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

Throughout this brief we will refer to the parties to this case as the Railroad Company for the Plaintiff in Error and the Government for the Defendant in Error.

This is an action brought by the Government against the Railroad Company under the 28 Hour Law (*Act June 29th,* 1906, *c.* 3594, 34 *Stat.* 607), involving the shipment of a car of hogs from Stevensville, Montana, over

the Northern Pacific Railway Company to Wallace, Idaho, and from there over the line of the Railroad Company to Osborne, Idaho.

It is undisputed that the car in question was loaded at Stevensville at about 12:30 o'clock on February 5th, 1912, that a 36-hour release was executed, and that the car was not unloaded at Osborne, Idaho, until the morning of February 7th, 1912, and after the 36 hours had expired (*Trans. pg.* 13).

In addition to the foreging it further appeared at the time the Government rested its case, that the car of hogs in question arrived in Wallace over the Northern Pacific about noon on February 6th (*Trans. pg.* 16). About that time it was placed on the transfer track between the Northern Pacific Railway Company's line and that of the Railroad Company, and a way bill covering the shipment was delivered to Mr. H. A. Bard, Agent for the Railroad Company, at Wallace (*Trans. pg.* 16). The Railroad Company did not have a train out of Wallace for Osborne until the morning of the 7th of February, and Mr. Bard, the Agent, seeing that it would be impossible to deliver the car at Osborne within the 36-hour limit, told the agent for the Northern Pacific that he would have to take the car back into his own yards and unload the hogs for feed, rest and water, and the agent of the Northern Pacific thereupon replied, "All right." (*Trans. pg.* 16.) This was at one o'clock on February

6th. Thereafter and at about 6:30 p. m. of the same day the Northern Pacific again tendered delivery of the car and the Railroad Company accepted it and it was lined up in its own train headed for Osborne, Idaho, on the following morning. Mr. Bard, the Railroad Company's agent, made no further inquiry to ascertain whether or not the Northern Pacific had in fact unloaded the car of hogs for rest, food and water, etc.

At the close of the testimony the Railroad Company made a motion for non-suit on the ground that the Railroad Company, when it finally accepted the car, did not know, or had no reason to believe that the Northern Pacific had not unloaded the stock at Wallace after the Railroad Company first refused to accept delivery, and for the other reasons stated in the motion (*Trans. pg.* 19). This motion the Court denied.

Thereupon the Railroad Company stated that it would stand upon its motion for non-suit and would offer no further evidence, and the Court instructed the jury. A verdict was returned against the Railroad Company, upon which judgment was thereafter entered (*Trans. pg.* 9).

SPECIFICATIONS OF ERROR.

Plaintiff in Error hereby designates the following errors committed by the trial Court, which it will rely upon here:

1. The District Court erred in overruling the Railroad Company's motion for a non-suit made at the close of plaintiff's case.

2. The District Court erred in giving the following instruction, to-wit:

"Now, practically the only serious question, the question about which the testimony is not clear, if you credit it, is as to whether or not the defendant here, the Oregon-Washington Railroad and Navigation Company, used reasonable care in finding out whether or not the stock was in fact unloaded and rested and fed and watered at Wallace, after the Agent of the defendant told the Agent of the Northern Pacific Railroad Company that it would not receive the car in its then condition. I advise you in that respect that it was the duty of the Defendant Company, through its Agent, to make reasonably inquiry and to use reasonable care to find out whether or not the stock had been unloaded and otherwise cared for as provided by the statutes, before it would be warranted in confining the stock longer in the car after it accepted the car. If you find that it did use such reasonable care and was misled, was deceived, and because of being so misled, after using reasonable care, and because of such deception, it inadvertently and unknowingly confined the stock or kept the stock confined longer than the statutory period, then your verdict should be in its favor. If, however, you find that it was not so deceived or misled,

then, if you find that the stock was confined in excess of the statutory period, you should find against the defendant."

3. The District Court erred in refusing to give Instruction No. 3 requested by the Railroad Company, as follows:

"If you find that the defendant, when it accepted the car of stock from the Northern Pacific Railway Company, on the morning of February 7th, and at that time had no notice or knowledge that the Northern Pacific Railway Company had failed to unload and feed the stock after it had first been refused by the defendant on February 6th, then I instruct you that the defendant had a right to presume that the Northern Pacific Railway Company had complied with the law, and in that event you are instructed that the defendant did not knowingly and wilfully confine the stock in violation of the statute, and under these circumstances your verdict must be for the defendant."

4. The District Court erred in refusing to give Instruction No. 4 requested by the Railroad Company, as follows:

"You are instructed that the failure of the Northern Pacific Railway Company to unload this stock after delivery was refused by the defendant on February 5th, if you so find, was an unavoidable cause which could not

be anticipated or avoided by the defendant, in the exercise of due diligence and foresight, and in that event your verdict must be for the defendant.''

ARGUMENT.

The Court will readily see that it is undisputed that the hogs were confined in the car in excess of the statutory period.

The several specifications of error all relate to one question, and that is as to whether the hogs were confined ''knowingly'' and ''wilfully'' within the meaning of the statute, and whether their confinement was due to an unavoidable cause which the Railroad Company could not have anticipated or avoided by the exercise of due diligence and foresight.

In the companion case to this, involving the shipment of hogs by the same railroad from Endicott, Washington to Wallace, Idaho, we have set forth the authorities which in our judgment control the decision in this case, and we will not burden the Court by referring to them at length here. The cases which it seems to us are particularly applicable to the facts in the case at bar, are

United States vs. Sioux City Stock Yards Company, 162 *Fed.* 565, and

St. Joseph Stock Yards Co., vs. U. S., 187 187 *Fed.* 104.

For convenience we wish to quote again from the lan-

guage of the Court, Circuit Judge Van Devanter, in *St. Louis & S. F. R. Co. vs. U. S.*, 169 *Fed.* 69, as follows:

"'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier receives from another a car loaded with cattle, and, *with knowledge of how long they then had been confined in the car* without rest, water or food, prolongs the confinement until the statutory limit is exceeded." (*Italics ours.*)

The foregoing statement of the proper construction to be given to the 28 Hour Law has been approved so often by various Federal Courts, that we doubt not that it will be accepted by this Court.

In view of this construction how can it be said that the Railroad Company in this case knowingly confined the hogs in question in violation of the statute? Does not the evidence disclose that Mr. Bard, the representative of the Railroad Company, took particular pains and care to avoid a violation of the law?

We ask the Court to bear in mind the situation in this case. Stevensville, Montana, is evidently located at a considerable distance from Wallace, Idaho, because it required the Northern Pacific Railway Company approximately 24 hours to bring the shipment from the former to the latter point. Osborne, Idaho, on the other hand, is

only a few miles from Wallace. The Northern Pacific Railway Company knew, or must have known, that the Railroad Company in this case had no regular train out of Wallace to Osborne until the following morning. In view of these circumstances it was right and proper for Mr. Bard, the Agent of the Railroad Company, in the interest of his company to decline to accept from the Northern Pacific the car of hogs when it was placed upon the transfer track and it showed his desire to avoid a violation of the law by his insisting that the Northern Pacific take the car back and unload, feed, water and rest the hogs.

But in addition to this Mr. Bard had the assurance of the Northern Pacific Agent that the car of hogs would be properly taken care of. A sufficient length of time elapsed for the Northern Pacific to care for the hogs as required by the statute, and as agreed by its agent, before the car was again tendered to the Railroad Company.

Now it seems to us that nothing short of knowledge on the part of the Railroad Company that the Northern Pacific had not unloaded the hogs, etc., would be sufficient to fix liability on the part of the Railroad Company. It is true that the Railroad Company had been advised of the time when the hogs were loaded, but on the other hand it had the assurance of the Northern Pacific that the hogs would be taken care of. Now it will, of course,

be conceded that if there had not been any notation on the way bill as to the time when the hogs were loaded, or if the Railroad Company in this case had not been otherwise advised as to the time when the hogs were loaded, it would not have been guilty of a knowing violation of the Act by confining them over the statutory period. This has been determined in *St. Louis & S. F. R. Co. vs. U. S., supra,* 169 *Fed.* 69, and further it could not be said that it would have been the duty of the Railroad Company under these circumstances to have used reasonable diligence in determining how long the hogs had been confined.

It seems to us that the same reasoning and the same argument applies to the situation in this case. Not only did the Railroad Company not have knowledge of how long the hogs had been confined in the car at the time of the second delivery to it at Wallace, but on the contrary had the right to assume under the circumstances that the Northern Pacific had performed its duty and had done what its agent agreed would be done in the matter of properly taking care of the hogs.

In this connection we think the learned trial Court erred in instructing the jury as indicated in Specification of Error No. 2. In our opinion the instruction is erroneous in two particulars. In the first place, we contend that no duty devolved upon the Railroad Company to use reasonable care to ascertain whether or not the

car of hogs had been unloaded after being first tendered to the Railroad Company by the Northern Pacific. In the second place, even assuming that the Railroad Company was required to use reasonable care the learned trial Court had no right to couple with that duty the further instruction that it was necessary for the Rail road Company to be misled or deceived before it could be excused for accepting the shipment.

The case at bar is analogous in many respects to those decisions of the Federal Courts where a shipment of cattle has been delivered to a terminal stock yards company, which also has switching facilities, at a time when the statutory limit has almost expired, and when there yet remains not sufficient time to complete the carriage within the statutory period. In this case the Northern Pacific knew that it was impossible for the Railroad Company to complete the carriage within the statutory limit by using its regular train, and when the Northern Pacific took the car back with the agreement to unload the shipment, we earnestly contend that the Railroad Company in this case had the right to rely upon the promise that the Northern Pacific would do its duty.

In this connection there is another consideration which we believe should be called to the attention of the Court as affecting the jurisdiction of the Court. It is undisputed that this shipment of hogs was billed from Stevensville, Montana, to Wallace, Idaho, and that it traveled

under such billing over the line of the Northern Pacific Railway Company to Wallace. After this shipment arrived at Wallace for some reason or other it was decided to change its destination and for convenience, and we assume for the purpose of avoiding making out a new way bill, the Northern Pacific agent at Wallace changed the way bill by striking out the word "Wallace" as the place of destination, and writing in "Osborne." (*Trans. pg.* 18.) It then became necessary for the shipment to pass over the line of the Railroad Company from Wallace to Osborne as the Northern Pacific Railway Company has no line into the latter point. It seems to us that the interstate character of the shipment vanished when the car arrived at Wallace, and as far as the Railroad Company in this case is concerned, it became merely an intrastate shipment. This is just as much true as if the Northern Pacific had unloaded the car of hogs at Wallace, driven them over to the stock pens of the Oregon-Washington Railroad & Navigation Company, where they would be loaded into a different car.

In any event it seems clear to us that the hogs in question were not confined by the Railroad Company wilfully and knowingly, and for that reason the judgment of the lower Court should be reversed, with instructions to dismiss the action.

Respectfully submitted,

A. C. SPENCER,

HAMBLEN & GILBERT,

Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals for the Ninth Circuit

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

No. 2238.

Upon Writ of Error in the United States District Court of Idaho, Northern Division.

BRIEF OF DEFENDANT IN ERROR

Defendant in Error, the United States, answering the brief of Plaintiff in Error, finds that the issues are confined to the single proposition as to whether or not the Court was justified in submitting the case to the jury.

There appears to be no disputed questions of fact. The stock in question was shipped from Stevensville, Montana, on February 5, 1912, consigned to F. A. Stevens. The hogs were loaded at 12:30 p. m. on said date and arrived at Wallace, Idaho, at about 12:30 p. m. on the 6th. At 1:00 p. m. on the 6th the agent of the railroad company refused to accept the car of hogs from the Northern Pacific for the reason, as claimed

by him, that the stock could not reach Osborne, Idaho, the place of destination, within the thirty-six hour period; and further that he informed the Northern Pacific agent that the Northern Pacific would have to take the car back into its yards and unload the hogs for food, water and rest. The Plaintiff in Error accepted the car for delivery between 6:25 and 6:30 p. m. on the 6th and made no inquiry as to whether or not the stock had been unloaded for food, water and rest.

The weigh bill delivered by the Northern Pacific to the railroad company disclosed that the car of hogs was "loaded February 5th at Stevensville, Montana, consignors May & Truner, consignee, F. A. Stevens, no one in charge, loaded 12:00 p. m., release 36 hours."

The fallacy of the contention of the railroad company is clearly shown by the fact that there was no obligation on the part of the Agent of the Northern Pacific to unload the stock for food, rest and water, as the stock had been confined about twenty-four and one-half hours at the time the agent of the railroad company refused to accept the car and turned it back to the Northern Pacific for unloading. The Plaintiff in Error, the connecting carrier, received the stock about 6:25 or 6:30 p. m. of the 6th, being the same evening, with knowledge that its next train for Osborne, Idaho, would leave on the following morning and that about 31 hours of the time had expired at the time of receiving the car. It clearly became the duty of the railroad company to make reasonable inquiry before confining the stock beyond the prescribed limit. It would not be germane to the spirit of the act to permit the initial and connecting carriers to undertake to shift responsibility from one to the other by giving directions as to their mutual duties, and thus defeat the salutary provisions of the act. To summarize:

(a) The railroad company had knowledge of the time the hogs were loaded;

(b) That there was no one in charge of the car;

(c) That a 36-hour release had been executed by the consignors;

(d) That the stock had been confined 24 1-2 hours when first tendered to the railroad company by the Northern Pacific agent;

(e) That about 31 hours had expired before the railroad company accepted the stock;

(f) That there was no obligation on the Northern Pacific agent to unload, feed, water and rest the hogs;

(g) That the weigh-bill delivered by the Northern Pacific to the railroad company imparted notice.

(h) That it became the duty of the railroad company to unload said hogs for food, water and rest at Wallace, Idaho;

(i) That the railroad company knowingly and intentionally confined the stock for a period of 43 hours and 45 minutes without unloading for food, water and rest.

The cases cited by counsel are not in point as the railroad company had knowledge of the length of time the hogs had been confined in the car, and any direlection by the Northern Pacific, or assurance of the Northern Pacific that the hogs would be taken care of, would constitute no defense, as there was no duty devolving upon the Northern Pacific to do so.

Section 3, of the act known as "The 28-hour law" gives a lien to the railroad company for expense incurred in unloading stock for rest, food and water

"Whether the railroad company knowingly and wilfully failed to comply with the statute is a question of fact for submission to the jury"

U. S. vs N. Y. Cen. & Hudson River Ry. Co., 156 *Fed.* 249.

U. S. vs. Lehigh Valley R. R. Co., 184 *Fed.* 871, *affirmed* 187 *Fed.* 1006.

U. S. vs. St. Joseph Stock Yards Co., 181 *Fed.* 625.

U. S. vs. North Pac. Terminal Co., 181 *Fed.* 879.

"The statute places the duty of feeding the cattle upon the carrier which transports them to their destination, and not upon independent companies which receive the live stock simply to give them food, water and rest at their stock yards, and then it surrenders them to the carrier for a continuance of the journey. If an independent company has actual knowledge of the confinement in cars beyond the time limited, and fails to use due diligence in unloading the stock, would doubtless be liable for its disregarding the law."

U. S. vs. Stock Yards Terminal Co., 178 *Fed.* 19.

"A carrier must be deemed to have knowingly and willingly violated the law, unless he was prevented from unloading for rest, food and water, as required by law, by a cause which could not have been avoided by due care."

Newport News & Miss. Val. Co. vs. U. S., 61 *Fed.* 488.

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edge of the confinement in cars beyond the time limited, and fails to use due diligence in unloading the stock, would doubtless be liable for its disregarding the law."

U. S. vs. Stock Yards Terminal Co., 178 *Fed.* 19.

"A carrier knowingly and wilfully violates the statute if it loads stock at one of its stations when according to the schedule or ordinary running time of the train it cannot reach a place where they will be unloaded and given food, rest and water within the required time, and they are not in fact given such food, rest and water."

U. S. vs. Sioux City Stock Yards Co., 162 *Fed.* 566.

See companion brief for further authorities.

No error having been committed by the Court in the submission of the case to the jury, the judgment should be affirmed.

Respectfully submitted,

C. H. LINGENFELTER,

United States Attorney for the District of Idaho, Attorney for Defendant in Error.